IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-252

TEXAS A&M UNIVERSITY, ET AL
Petitioners

v.

GAY STUDENT SERVICES, ET AL,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

J. PATRICK WISEMAN
NELSON & MALLETT
3303 Main, Suite 300
Houston, Texas 77002
(713) 526-1778

LARRY SAUER
Attorney at Law
4803 Montrose, Suite 11
Houston, Texas 77006
(713) 526-5235

Counsel for Respondent

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

The Respondents, GAY STUDENT SERVICES, et al., respectfully request that this Court deny the petition for writ of certiorari invoked pursuant to 28 U.S.C. § 1254 (1), seeking review of the Fifth Circuit's Opinion in this case. That Opinion, styled *Gay Student Services, et al. v. Texas A&M University, et al,* No. 77-3395 and decided on February 20, 1980, is reported at 612 F.2d 160.

REASONS WHY WRIT SHOULD BE DENIED

I.

NO CONFLICT EXISTS

The conflict asserted by the Petitioners between the instant cause and *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470 (3rd Cir. 1978), *cert. denied* ____U.S.____, 100 S.Ct. 61 (1979) is illusory. It is true that the decision of the Fifth Circuit Court of Appeals in the cause *sub judice* held that:

> [A]n institution of higher learning, such as the university here involved, no longer enjoys absolute Section 1983 immunity (footnote omitted). *Monell* [*v. Dept. of Soc. Serv. of City of New York*, 436 U.S. 658 (1978)] did not specifically mention universities as "persons" but there would appear to be no analytical difference in the operation of universities and other governing bodies such as cities.

Gay Student Services, 612 F.2d at 163-4. Further, the Circuit Court made clear that this holding was premised upon the rationale that the "person" requirement of 42 U.S.C. § 1983[1] "is not intended to have a bifurcated application dependent on the nature of the relief sought." *Gay Student Services*, 612 F.2d at 164 n.3. But in so holding, the Circuit Court expressly denied abbreviating whatever Eleventh Amendment immunities are available to these Petitioners. *Gay Student Services*, 612 F.2d at 164-5. Due to the posture of the case[2] a finding that Texas A&M Uni-

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1. Each Constitutional provision and statutory enactment referred to is set out in an Appendix attached hereto.

2. This cause reached the circuit shortly after its origination prior to any development of the facts. Plaintiffs filed their Original Complaint on February 28, 1977. On June 28, 1977, the Defendants

versity was or was not an alter ego to the State was pretermitted.[3] *Gay Student Services,* 612 F.2d at 165. In disassociating the Eleventh Amendment issue the Circuit Court held that:

> If Texas A&M University is an arm of the State such that any recovery of damages would, in effect be against the State, to come from the State Treasury, then the Eleventh Amendment would bar the action and recovery.

Gay Student Services, 612 F.2d at 165.

Skehan, supra, is easily reconciled with this holding. *Skehan's* essential finding was that:

> [A]bsent a much clearer statement by the Supreme Court [than found in *Monell, supra*] to the effect that Section 1983 must now be construed as waiving the state's sovereign immunity *from awards of monetary damages,* this Court considers itself bound by the holding of *Edelman* [*v. Jordan,* 415 U.S. 651 (1974)] to the contrary. (emphasis supplied.)

Skehan, supra at 490. Thus, it is apparent that the holdings in *Gay Student Services* and *Skehan* do not engage the issues suggested in Petitioner's application for certiorari. It follows that the claimed conflict does not exist. As such, the petition should be denied and resolution of this matter await a more appropriate day after the various

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filed a Motion to Dismiss which was granted on November 2, 1977. Thereafter the cause proceeded to the circuit on appeal. *See Gay Student Services, supra* at 163.

3. Petitioners suggest that there exists a judicial determination that Texas A&M University is "state-owned and operated". Petition for Writ of Certiorari at p. 4. As will be discussed more fully *infra,* no determination has as yet been made concerning the University's position vis-a-vis the State of Texas.

lower federal forums have had the opportunty to elucidate the legal precepts involved.

II.

SOVEREIGN IMMUNITY NOT DETERMINED

Nor does the cause *sub judice* provide an adequate foundation for the requested plenary review of the relationship between the Eleventh Amendment to the United States Constitution and 42 U.S.C. § 1983.

(A) Texas A&M University May Not be an Alter Ego of the State.

As noted in the Opinion below, there is as yet no evidence establishing the nature of Texas A&M University's agency relationship with the state. *Gay Student Services*, 612 F.2d at 165 n.6. There is little rationale in this Court's undertaking to rule upon whether a state agency is immune from suit when the record does not disclose that we deal with an agency that would be entitled to such immunity. *See Unified Sch. Dist. No. 480 v. Epperson*, 551 F.2d 254 (10th Cir. 1977), vacated and remanded on other grounds 435 U.S. 948 (1978) point reiterated on remand 583 F.2d 1118 (1978). To do so would be to render a mere advisory opinion or to undertake the fact finding functions dedicated, in the first instance, to the District Court.

(B) The Right to State Sponsored Immunity From Injunctive Relief is Not Presented.

A state agency (presupposing that Texas A&M University is such an agency) does not stand foursquare with the state itself for purposes of the Eleventh Amendment.

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, ____U.S.____, 99 S.Ct. 1171 (1979); *Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636 (1911). The Constitution establishes a system of confederated states. The workings of this system, in its complexity, have been referred to as "our federalism". *See, e.g., National League of Cities v. Usery*, 426 U.S. 833 (1976); and *Younger v. Harris*, 401 U.S. 37 (1971). In this configuration the national government should and must show due deference to the individual states. *Younger, supra.* Traditionally, one demonstrable attribute of perfecting that deference has been the adherence to the immunity of the states to prosecution in federal courts without consent.

> Because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial powers has long been considered to be appropriate in a case such as this.

Employees of Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare, 411 U.S. 279, 294 (1973) (Marshall, with Stewart, concurring).

Recognizing the impact of the Fourteenth Amendment this Court has substantially limited that immunity. *See Ex Parte Young*, 209 U.S. 123 (1908); *Malone v. Bondain*, 369 U.S. 643 (1962); *Dµgan v. Rank*, 372 U.S. 609 (1963); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Hutto v. Finney*, 437 U.S. 678 (1978); *and City of Rome v. United States*, ____U.S.____, 100 S.Ct. 1548 (1980). Even *Edelman*, 415 U.S. at 664, recognizes that a prevailing plaintiff is entitled to prospective relief from the State. *See also Milliken v. Bradley*, 433 U.S. 267, 290 (1977).

Thus it follows that the traditional precepts to be preserved by immunity are not nearly as pervasively involved when a mere state agency (as opposed to the state itself) is sought as a defendant. It might well be that upon a full evidentiary consideration of this cause, the District Court would determine that there is little analytical difference from enjoining a state officer, in his official capacity, and enjoining this state agency. In neither case is the state an actual party. Rather, only its agents, corporate or personal, are involved. Nonetheless, this is obviously an issue that need not be addressed until after the factual determination of whether or not Texas A&M is a state university has been made.

Consequently, its resolution is inextricably bound up with the factual setting yet undeveloped on this record. It evades logic and the efficient use of limited judicial resources to reach the issue of a state agency's Eleventh Amendment immunity without having first fully explored the relevant precursors.

(C) Waiver of Immunity Unexplored.

Finally, this Court has found states to have waived their rights to sovereign immunity and/or consented to suit in the federal courts. *See, e.g., Parden v. Terminal R. of Alabama State Docks Dept.,* 377 U.S. 184 (1964); *and Curran v. Arkansas,* 15 How. 304 (1853). The court below specifically referenced the waiver issue and left this matter open for resolution by the District Court. *See Gay Student Services,* 612 F.2d at 165 and n.6. It may be that Texas A&M University has generally consented to process and suit within the federal courts [*Parden, supra*] or has specifically waived these defenses in order to receive federal funding or to engage in interstate com-

merce of one nature or another. [*Chesapeake Bay Bridge & Tunnel Dist. v. Lauritzen,* 404 F.2d 1001 (4th Cir. 1968)].

Likewise, waiver has been found where the state has failed to timely plead its immunity privilege. *Clark v. Barnard,* 108 U.S. 436 (1883). Or a more limited waiver may be found. In the instant cause, the Petitioner filed its Answer in the District Court without asserting sovereign immunity. To be sure, a subsequent Motion to Dismiss raised Eleventh Amendment defenses. Without a hearing, without stated rationale and prior to discovery, the District Court dismissed the action even in light of the fact that sovereign immunity can be waived by a failure to timely plead it. *Clark v. Barnard,* 108 U.S. 436 (1883). Upon remand, it may well be determined that no waiver occurred merely by appearance without assertion of the Eleventh Amendment bar. *See McDonald v. State of Illinois,* 557 F.2d 696 (7th Cir. 1977) cert. denied 434 U.S. 966 (1978). Nonetheless, this factual determination initially should best be left to the District Court.

III.

ALTERNATIVE GROUNDS FOR HOLDING BELOW

(A) Direct Cause of Action Under the Fourteenth Amendment.

As alleged in their Original Complaint, filed in the District Court, and as briefed on appeal,[4] the Respondents assert a direct cause of action under the Fourteenth

4. Brief of Appellant to the Fifth Circuit Court of Appeals at pp. 9-10.

Amendment to the United States Constitution. This issue was not reached either by the District or the Circuit Court.

Certainly the cases emanating from this Court lend credence to the proposition that such an action would allow the inclusion of a state agency as a party defendant. *See gen., Carlson v. Green,* ____U.S.____, 100 S.Ct. 1468 (1980); *Davis v. Passman,* ____U.S.____, 99 S.Ct. 2264 (1979); *City of Kenosha v. Bruno,* 412 U.S. 507 (1973); *Bevins v. Six Federal Narcotics Agents,* 403 U.S. 388 (1971); *Bell v. Hood,* 327 U.S. 678 (1946); *and Wiley v. Sinkler,* 179 U.S. 53 (1900). While none of these cases specifically allow the involvement of a state agency as a party defendant, the rationale in *Carlson* at least suggests that where 42 U.S.C. § 1983 falls short of allowing a defendant to reach the real party at interest a direct cause under the Fourteenth Amendment will be implied.[5]

If such an action can indeed be implied then no serious question exists that sovereign immunity would not preclude prospective relief. *Edelman,* 415 U.S. at 664; and *Milliken v. Bradley,* 433 U.S. 267, 289 (1977). Consequently, this Court should not now entertain a challenge

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5. Such a bifurcation would not be without its own internal logic. An important distinction between § 1983 and an implied Constitutional cause of action is that the former is far more inclusive in its reach, embracing as it does both Constitutional and statutory claims. *Maine v. Thiboutot,* ____U.S.____, 100 S.Ct. 2502 (1980). Congress may well have been reluctant to allow a suit directly against the State, in its own name, where statutory construction (with only tenuous relations to the Constitutional structure of the Fourteenth Amendment) forms the basis for the harm alleged. Conversely, violations of the core values of that Amendment are most likely to require direct sanctions upon the State.

to the District Court's ability to fashion appropriate equitable relief.[6]

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6. Damages against the State may also be available. Where Constitutional claims are asserted which involve violations of civil liberties the Fourteenth Amendment may abrogate *pro tanto* the Eleventh Amendment defense. That is, the Fourteenth Amendment, by its essential nature may be inconsistent with the existence of sovereign immunity and the states, by ratifying the Amendment may have waived their general right not to be sued by private citizens. The Amendment's passage resulted in a basic alteration of "our Federal System wrought in the reconstruction era and worked a vast transformation from the concepts of federalism that had prevailed in the late Eighteenth Century." *Mitchum v. Foster*, 407 U.S. 225, 238 (1971); *and Swickler v. Koota*, 389 U.S. 241 (1967). *See also* B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction*, 292-319 (Negro University Press 2d ed. 1969 N.Y.). It created circumstances in which state immunity has no place, by stripping the states of their hitherto existing sovereign power to deny equal protection or due process of law. The case law has recognized the enormous impact of the reconstruction amendments on sovereign immunity. *See Ex Parte Virginia*, 100 U.S. 339 (1880); *Prout v. Starr*, 188 U.S. 537 (1903); *General Oil Company v. Crain*, 209 U.S. 211 (1908). Moreover, this Court has illuminated the powers of Congress vis-a-vis the states at least where Congress acts pursuant to the Fourteenth Amendment:

> [W]e think that the Eleventh Amendment, and the principles of state sovereignty which it embodies [citation omitted] are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that Section Congress is expressly granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the Constitutional grant, it is exercising that authority under one section of a Constitutional Amendment whose other sections by their own terms embody limitations on state authority.

Fitzpatrick v. Bitzer, supra at 456. Uncertainty still fogs perception of precisely what limitations are embodied within the Fourteenth Amendment absent congressional action. *Cf. City of Mobile, Ala. v. Bolden*, ____U.S.____, 100 S.Ct. 1490, 1504 (1980). But, if we suppose that First Amendment values are implicit in Section One we must then also determine that state immunity is precluded.

> The Fourteenth Amendment, like its companions the Thirteenth [*Jones v. Aldred H. Meyer Co.*, 392 U.S. 409 (1963)] and Fifteenth

In this context, with a potentially dispositive cause of action not reached by the courts below and not brought forward here,[7] *Carlson* dictates caution. *See Carlson*, 100 S.Ct. at 1471 n.6.

This issue is not squarely presented nor has it been briefed by Petitioner[8] and thus the interests of judicial

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[*South Carolina v. Katzenback*, 383 U.S. 301, 325 (1965)], is self-executing and self-enforcing. As early as 1883, the Supreme Court noted that:

> The first section of the Fourteenth Amendment . . . is prohibitory in its character, and prohibitory upon the States . . . It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property, without due process of law, or which denies to any of them the equal protection of the laws.

The Civil Rights Cases, 109 U.S. 3, 10-11 (1883). *See also Oliver v. Donavan*, 293 F.Supp. 958 (S.D. N.Y. 1968). Section Five of the Fourteenth Amendment, potent though it may be:

> [D]oes not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under Section Five is limited to adopting measures to enforce the guarantees of the Amendment; Section Five grants no power to restrict, abrogate, or dilute these guarantees.

Katzenback v. Morgan, 384 U.S. 641, 651 n.10 (1966). Thus, it appears that (whatever powers Congress may possess to expand the areas of concern protected by the Fourteenth Amendment) the mere fact that the Amendment itself protects certain core values restricts the State's immunity by the very words of Section One itself. In that light, damages which historically have been regarded as the ordinary remedy for invasions of personal interests in liberty are appropriate here. *Cf. Davis v. Passman, supra* 99 S.Ct. at 2276-77.

7. This issue was not addressed by the Circuit Court in light of its holding that Texas A&M University is a "person" within the parameters of 42 U.S.C. § 1983. *Gay Student Services*, 612 F.2d at 166. Thus, the matter would remain viable on remand should this Court hold that the University is not such a "person".

8. *See* Brief of Appellee to the Fifth Circuit Court of Appeals at p. 1.

administration will not best be served by addressing it herein, at least until after remand has solidified the facts and the legal issues.

As this Court stated in *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 278 (1977):

> The question of whether . . . we should by analogy to our decision in *Bivens* . . . imply a cause of action directly from the Fourteenth Amendment . . . is one which . . . should not be decided on this record.

(B) The State is the Real Party at Interest for Purposes of Attorneys' Fees.

To further complicate the factual array presented by this cause, 42 U.S.C. § 1988, recently amended by the Civil Rights Attorneys' Fees Awards Act of 1976, is an available remedial statute to which the Respondent is entitled to resort. *Hutto v. Finney,* ____U.S.____, 98 S.Ct. 2565 (1978). Congress made plain that the real party at interest when such fees are asserted against the state is the state itself.

> [D]efendants in these cases are often state or local bodies or state or local officials. In such cases it is intended that the attorneys' fees [awardable under 42 U.S.C. § 1988], like other items of cost [footnote omitted], will be collected either directly from the official, in his official capacity [footnote omitted], from funds of his agency or under his control or from the state or local government (whether or not the agency or government is a named party).

Leg. History, *The Civil Rights Attorneys' Fee Award Act of 1976,* 1976 U.S. Code Cong. And Admin. News 5908, 5913. Admittedly, prior to the inclusion of the attorneys' fees provision, 42 U.S.C. § 1988 had generally been construed not to create a substantive cause of action. *Moor v. County of Almeda,* 411 U.S. 693 (1973). Nonetheless, the impact of the statute upon the state's Eleventh Amendment immunity is substantial. *See Hutto,* 98 S.Ct. at 2578 n.31. The resolution of the knotty question whether the state may be named as a defendant solely for the purposes of 42 U.S.C. § 1988[9] should, like the other open questions alluded to above, await a factfinding determining the status of Texas A&M University vis-a-vis the State of Texas.

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9. *N.Y. Gaslight Club, Inc. v. Carey,* ____U.S.____, 100 S.Ct. 2024 (1980) makes this issue even more imposing. There this Court, in the context of the closely related fee award provisions of 42 U.S.C. § 2000e-5(k), held that:

> [W]e must conclude that [the statute's] authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings [footnote omitted].

N.Y. Gaslight Club, Inc., supra, 100 S.Ct. at 2032. Thus, it is at least arguable that this independent cause of action, meant literally to include the State (*See* 1976 U.S. Code Cong. And Admin. News, *supra* at 5913, cited above) would support such an action in the name of the state itself.

CONCLUSION

For each of these reasons Respondents suggest that resolution of the complex issues involved is premature. Consequently, petition for a writ of certiorari should be denied thereby muscularizing the remand of the Circuit Court.

Respectfully submitted,

NELSON & MALLETT
3303 Main, Suite 300
Houston, Texas 77002
(713) 526-1778

ORIGINAL SIGNED BY
J. PATRICK WISEMAN

By: _____
J. PATRICK WISEMAN

LARRY SAUER
Attorney at Law
4803 Montrose, Suite 11
Houston, Texas 77006
(713) 526-5235

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Respondents' Brief in Opposition have been furnished to Ms. Ann Kraatz, Assistant Attorney General, Supreme Court Building, P. O. Box 12548, Capitol Station, Austin, Texas 78711, by certified mail, return receipt requested, on this the 13th day of October, 1980.

ORIGINAL SIGNED BY
J. PATRICK WISEMAN

J. PATRICK WISEMAN

APPENDIX

THE 11th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

* * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983. *Civil Action for Deprivation of Rights*

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988. *Proceedings in Vindication of Civil Rights.*

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX

of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000e-5. *Attorney's Fee; liability of Commission and United States for Costs*

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.